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Supreme Court of the United States

October Term, 1948

Nos. 567, 568

HARVEY STEMMER and DAVID KRAKOWER,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR REHEARING

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioners Harvey Stemmer and David Krakower respectfully ask this Court to grant a rehearing of the decision rendered by this Court on May 2, 1949, affirming by an equally divided Court their conviction by the Courts of the State of New York.

On April 4, 1949, this Court granted petitioners' applications to review the judgment of the Court of Appeals of the State of New York (reported in 298 N. Y. 728), which affirmed a judgment of the Appellate Division of the Supreme Court of that state (reported in 273 App. Div. 854), which latter judgment affirmed a conviction of the petitioners in the Court of General Sessions of the County of New York for conspiracy and bribery. The questions presented for consideration by this Court were whether or not the Federal Communications Act prohibited

the disclosure of telephone conversations by a state law enforcement agent, and, if so, whether a state court might listen to such divulgence and use the evidence thus disclosed as a basis for convicting persons accused of crime. These questions have never heretofore been passed upon by this Court.

Because both petitioners are presently confined in the penitentiary, counsel arranged to have the writs of certiorari herein promptly argued, and no further briefs were filed in addition to those submitted at the time of the making of the applications for certiorari. Argument of the writs was heard by this Court on April 22nd and 25th, 1949.

There can be no doubt that the questions presented are of national importance. Wire tapping evidence has frequently been used in state courts to support convictions of crime. It is in the public interest that it be determined whether or not this is prohibited by federal law.*

Petitioners take the liberty of urging Mr. Justice Jackson to reconsider his decision not to participate in this case so that there can be a determination of the important issues here involved.

Petitioners are also amplifying some matters advanced on the argument, in the hope that this may be helpful to the Court when giving further consideration to the present problem.

1. With respect to the question of interstate messages, it should be pointed out that in addition to the interstate message to which petitioner Stemmer was a party, but

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* The threat of disclosure of information secured by wire tapping is often a fruitful source of the crime of blackmail, as well as a means of apprehension and conviction of crime. For this reason alone, public policy dictates its abolition.

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which appears not to have been read to the trial court (See R. 64, 65), the contents of a number of interstate messages were actually testified to at the trial and allowed in evidence against all of the defendants (Exs. 5D, R. 47; 5J, R. 52; 5K, R. 53; 5M, R. 56). While neither of petitioners was a party to these conversations, that circumstance should make no legal difference, since there is no contention that the parties to the conversations consented to their divulgence. There is nothing in *Goldstein* v. *United States,* 316 U. S. 114, which requires any different result. In that case the messages themselves were not divulged in the trial court. This Court held merely that the prohibition against divulgence did not go so far as to prohibit the use of information obtained as the result of wire taps, where none of the defendants was a party to the conversations overheard.

We submit, moreover, that even if there were no interstate messages at all, the ruling in the *Weiss* case is applicable to the case at bar and brands as illegal the divulgence of the intrastate messages to which petitioners concededly were parties. Indeed, on the argument herein counsel for the State of New York did not challenge this view.

2. Counsel for the State of New York rested his argument that state officers were not included in the ban on the Federal Communications Act primarily on the fact that certain members of Congress, when debating proposals to amend the Communications Act, had assumed that the New York practice authorized wire tapping. But a careful reading of the debates which then occurred (86 Congressional Record, 9943–52, and 88 Congressional Record, 4595–4602) shows that no question of conflict between the federal law and the state practice was considered and that Congress was primarily concerned with the propriety of

granting the request of the federal government to permit its agents to tap wires in certain limited situations. The argument that Congress was considering placing federal law enforcement agents on an "equality" with state law enforcement agents is wholly specious, for the proposals before Congress would have permitted wire tapping by federal law enforcement agents only in cases having to do with national security and then only for a limited period of time. The proposals were expressly described as war measures. The reference by Congressman Celler to the New York practice was purely incidental. There is no basis for inferring that the motivation which induced the House of Representatives to approve the proposals then before it rested on any belief that state law enforcement agents were exempt from the ban of the federal law. In any case, the proposed measures did not become law. See *Goldstein* v. *United States*, 316 U. S. 114, 129, note 5.

Surely the state's argument on this subject cannot overcome the plain, comprehensive and all-embracing words of the statute and justify the conclusion that they should be rewritten by this Court so as to add a proviso "that this statute shall not apply to any state law enforcement agencies".

In this connection we call attention to *Hines* v. *Lowrey*, 305 U. S. 85. In that case Congress limited the amount of fees which might be paid to attorneys in connection with veterans' matters. Although there was no express reference to state courts this Court held that no state court could allow a fee larger than the one fixed by Congress.

3. There can be no doubt that if the federal communications statute be given the meaning which the plain words of the statute require so that *all* persons are barred

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from divulgence, then no state constitution or statute can nullify this federal law. As Mr. Justice Black said in *Kalb* v. *Feuerstein*, 308 U. S. 433, at p. 439:

> "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land."

4. There is a consideration in this case which was not developed during the argument and may not, perhaps, have been brought to the attention of the Court. The question whether or not the Federal Communications Act does apply to divulgence by state as well as federal law enforcement officers is, of course, a federal question on which the decision of this Court alone can be final. It is important in the public interest that there be such a decision so that state law enforcement officers shall have an authoritative guide for their future conduct and that state courts be informed of the view of this Court on that question.

It may, however, not necessarily follow if this Court accepts petitioners' view on this matter that state courts are prevented from receiving the contents of wire taps in evidence. The extent to which this Court may pass on the right of a state court to receive evidence, in the absence of a specific Congressional directive on the subject, is a question which we conceive to be much more troublesome than the question of the proper interpretation of the Federal Communications Act. To some extent this Court has that same question before it in Nos. 17 and 18, *Wolf* v. *Colorado*, which were argued last October but have not yet been decided. Those cases deal with searches and seizures claimed to have been unlawful and present a challenge to the right of a state court to receive the seized material in evidence.

It is possible, we suggest therefore, that this Court might conclude that the Federal Communications Act bars the divulgence of wire taps by state law enforcement officers, as well as federal law enforcement officers, and yet determine that it is for the state court to decide whether, in the face of this Court's declaration that the divulgence constitutes a violation of a federal law, it would nevertheless countenance the reception of such evidence.

A disposition of this case along these lines would at least definitely clarify the law so far as the meaning of the Federal Communications Act is concerned, while leaving it to the good judgment of each state court of last resort to determine how the law shall be applied to the demands of its own law enforcement agencies to present to its courts evidence the very giving of which constitutes a federal crime.

5. Finally, we suggest that the problem of affirmances by an equally divided Court is one which this Court may feel requires legislative solution. There have so far been five of such affirmances at this Term of the Court, several of them involving issues of great public importance. This situation has been called to the attention of the Chairmen of the respective Judiciary Committees of the House and Senate in the hope that legislation may be enacted which would prevent the recurrence of such stalemates in the future.

There are, of course, several different ways by which this problem can be approached. The simplest solution might be to provide that in the event that one of the Justices of the Court disqualified himself, then the remaining most recently appointed Justice should also be required not to participate in the decision. While that proposed solution would not take care of the case where

more than one of the Justices of this Court disqualified himself, such a situation has been of rare occurrence. At least this proposed solution would have taken care of the problem in all five of the cases which arose at the instant Term. We respectfully suggest to the Court that if the Court is not prepared to revise its previous decision, it nevertheless hold decision on the pending application for a rehearing in abeyance at least long enough to ascertain whether there is any likelihood of action by the Congress on the proposed legislation, so that the case may be on the docket of this Court should any law be enacted.

WHEREFORE, petitioners pray that this Court grant petitioners a rehearing. Petitioners further pray that Mr. Justice Jackson reconsider his reasons for not participating in this case in the light of the equally divided Court and that he participate in the hearing of further argument, and, if necessary, in the final decision of this case.

Counsel represent to the Court that this petition for rehearing and other relief is not filed for the purpose of delay.

May 13, 1949

Yours respectfully,

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